STATE OF WISCONSIN
SUPREME COURT

Case No. 2020AP002007

Catholic Charities Bureau, Inc., Barron County Developmental Services, Inc., Diversified Services, Inc., Black River Industries, Inc., and Headwaters, Inc.,
Petitioners-Respondents-Petitioners,

v.

State of Wisconsin Labor and Industry Review Commission,
Respondent-Co-Appellant,
State of Wisconsin Department of Workforce Development,
Respondent-Appellant.

ON APPEAL FROM THE COURT OF APPEALS, DISTRICT 3
REVERSING AN ORDER OF THE CIRCUIT COURT FOR
DOUGLAS COUNTY, HONORABLE KELLY J. THIMM
Circuit Court Case No. 2019CV000324

RESPONSE BRIEF OF RESPONDENT-APPELLANT STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT and RESPONDENT-CO-APPELLANT STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION

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STATEMENT OF ISSUES

1. Services performed by employees for a nonprofit "organization operated primarily for religious purposes" are exempt from unemployment insurance coverage. Wis. Stat. § 108.02(15)(h)2.[1] The Labor and Industry Review Commission ("commission") and the court of appeals determined that the five nonprofit corporations in this case are not operated primarily for religious purposes because they provide secular social services and no religious programming.[2] Are the five nonprofit corporations operated primarily for religious purposes and therefore exempt from unemployment insurance coverage under Wis. Stat. § 108.02(15)(h)2.?

The circuit court answered: Yes.

The court of appeals answered: No.[3]

2. Do the court of appeals' and commission's decisions violate the First Amendment to the Constitution of the United States or Article I, section 18 of the Wisconsin Constitution?

The court of appeals answered: No.

STATEMENT OF FACTS

Each of the five nonprofit corporations (the "employers") in this case has been subject to the Wisconsin unemployment insurance laws. One employer, Catholic Charities Bureau ("CCB"), became subject in 1972, after it submitted a Department of Workforce Development ("department") form indicating that the nature of its operations was charitable, educational, and rehabilitative rather than religious. (R99:45 and R67:15-17) Two other employers, Black River Industries Inc. ("BRI") and Headwaters Inc. ("Headwaters") became subject in 1983. (R61:7 and 11) The employers have been reporting their employees' wages under a group

[1] The nonprofit must also be "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

[2] The commission issued a separate decision to each employer. (R55:2-43) Separate appeals were taken to the five decisions and those appeals were consolidated before the circuit court.

[3] *Catholic Charities Bureau, Inc. v. LIRC,* 2023 WI App 12, 406 Wis. 2d 586, 987 N.W.2d 778.

account entitled "Catholic Charities" and elected reimbursement financing.[4] (R61:3-7, R67:5 and R99:34)

The employers provide secular social services, mostly funded through government grants and contracts. (R100:42 and 155) Barron County Developmental Services Inc. ("BCDS") provides sheltered employment to individuals with developmental disabilities. (R100:108) BCDS contracts with the Wisconsin Department of Workforce Development, Division of Vocational Rehabilitation ("DVR") to provide employment assessment and job development services to individuals with disabilities. (R100:235-236) BCDS also contracts with private companies to perform subcontracted work. (R65:12 and R100:238-239) BCDS is primarily funded by government grants and the contracts with private businesses. BCDS receives no funding from the Diocese of Superior ("Diocese"). (R100:239)

In December 2014, the board of directors for Barron County Developmental Disabilities Services requested to become an affiliate of CCB and became BCDS. (R100:233 and R65:10-11) The organization had no previous religious affiliation. (R100:233-234) The type of services and programing provided by the organization did not change after it affiliated with CCB. (R100:236-237)

BRI provides services to individuals with developmental disabilities, mental health disabilities, and individuals with a limited income. (R100:252-253) To provide these services, BRI: works with DVR to provide job training skills (R100:278-279); contracts with Taylor County to provide mental health services (R100:272); and operates a food service production facility, shredding program, and mailing services program to serve the community and provide job training. (R100:283-285) BRI receives no funding from the Diocese. (R100:273)

[4] Nonprofit employers may finance their employees' unemployment benefits by electing to reimburse the department for benefits paid to their employees instead of paying quarterly unemployment insurance tax contributions. Wis. Stat. § 108.151.

Diversified Services Inc. ("DSI") provides services to individuals with developmental disabilities. (R100:220-221 and R65:57-58) DSI provides work opportunities for individuals with disabilities and also hires individuals without disabilities for production work. (R100:240-241) Most of DSI's funding comes from Family Care, a long-term care program, from DVR, and from private contracts. (R100:227-228, 246) DSI receives no funding from the Diocese. (R100:246)

Headwaters provides support services for individuals with disabilities. (R100:184) Individuals are referred to Headwaters from long-term care service funding agencies. (R100:185) Headwaters contracts with DVR to provide employment assessment and job development services for individuals. (R64:49 and R100:200-201) Headwaters has work-related contracts for individuals to learn work skills while earning a paycheck and teaches life skills to individuals with disabilities. (R64:48 and R100:206, 211)

Headwaters also provides Head Start home visitation services. (R100:209) Headwaters had provided birth-to-three services until Tri-County Human Services took over providing those services. (R100:205) Most of Headwaters' funding comes from government grants and it receives no funding from the Diocese. (R100:204 and R64:1)

CCB has separately incorporated sub-entities that operate 63 service programs. (R57:11) One sub-entity offers housing to seniors, individuals with disabilities, and individuals with mental illness. (R62:29-47, 55 and R100:173-174) Other sub-entities provide home health care services, daycare services for the elderly and for children. (R62:1-15 and R100:103-104, 106-107, 177-178) CCB's executive director, a layperson, oversees the operations of each of the sub-entities. (R100:65, 125) CCB also provides management services and consultation to its sub-entities, establishes, and coordinates their missions, and approves their capital expenditures and investment policies. (R57:39-40)

The individuals participating in the employers' programs are not required to attend any religious training or orientation. (R100:92, 234, 288) Employees, board members and participants are not required to have any religious affiliation. (R97:17 and 100:92, 187-188, 219, 233, 287)

The employers are exempt from federal income tax under section 26 U.S.C. § 501(c)(3) of the Internal Revenue Code under a group exemption. (R100:56 and R57:22-30). The group exemption applies to "the agencies and instrumentalities and the **educational, charitable, and religious** institutions operated by the Roman Catholic Church in the United States" that are subordinate to the United States Conference of Catholic Bishops. (R57:22 emphasis added) The employers' brief crops the language of the IRS exemption, making it appear that the IRS had determined that each employer is operated exclusively for religious purposes. (Employers' brief 17) The IRS **does not** determine which organizations are included in a group exemption and organizations exempt under a group exemption **do not** receive their own IRS determination letter. (R57:25) The IRS **did not** determine that each of the employers is operated exclusively for religious purposes. *Catholic Charities,* ¶ 39, n.11.

APPLICABLE STATUTE

Wisconsin unemployment insurance law excludes from covered "employment" services performed for certain organizations. Wisconsin Stat. § 108.02(15)(h) provides:

> "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> 1. In the employ of a church or convention or association of churches;
>
> 2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches; or
>
> 3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

The focus of the parties' dispute is the exemption under subdivision 2. The specific issue before this Court is whether the employers are operated primarily for religious purposes.

ARGUMENT

The employers provide **secular** social services to the public but insist that they should be exempt from unemployment insurance coverage based on a statute that only exempts nonprofits operated primarily for **religious** purposes. The employers' interpretation of the "operated primarily for religious purposes" clause is unreasonable because their interpretation does not give meaning to the entire statute, contradicts the legislative history, departs from the manner in which the word "purposes" is used in connection with religious activities in other statutes, and is inconsistent with this Court's decision in *Coulee Catholic Schools v. LIRC.*[5]

The commission correctly held that the employers' activities, rather than the religious motivation behind them, determine whether an exemption for participation in the unemployment insurance program is warranted. Finally, the Wisconsin and U.S. Constitutions permit laws of general application, like the unemployment insurance law, to be applied to employers affiliated with religious entities.[6] Accordingly, this Court should confirm the commission's decisions.

I. Scope and standard of review

This Court reviews the commission's decision rather than the decision of the court of appeals. *Heritage Mutual Ins. Co. v. Larsen*, 2001 WI 30, ¶ 25, n.13, 242 Wis. 2d 47, 624 N.W.2d 129. However, it may benefit from the lower court's analysis. *Id.*

A commission unemployment decision may only be set aside on limited grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order.

[5] 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.
[6] *See Coulee,* 320 Wis. 2d 275, ¶ 65.

Wis. Stat. § 108.09(7)(c)6. Whether an employer has proven that it is exempt from coverage under the state unemployment system is a mixed question of law and fact. *Nottelson v. DILHR,* 94 Wis. 2d 106, 287 N.W.2d 763 (1980).

A. The commission's findings of fact and determinations as to the weight and credibility of evidence are conclusive upon reviewing courts.

Review of the commission's findings of fact is significantly limited. *Heritage Mutual,* 2001 WI 30, ¶ 24. Findings of fact made by the commission under chapter 108, the unemployment insurance law, are conclusive if supported by any credible evidence in the record.

Courts review the commission's findings on appeal, not those of the administrative law judge. *Anheuser Busch, Inc. v. Indus. Comm'n*, 29 Wis. 2d 685, 692, 139 N.W.2d 652 (1966). The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the commission. *Brickson v. DILHR*, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a decision. *Cornwell Personnel Assoc., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). Substantial evidence, for purposes of review of an unemployment insurance decision, does not require a preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion the commission reached. *Holy Name Sch. v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982).

In determining whether substantial evidence supports a finding, the evidence is to be construed most favorably to the commission's findings. *Cornwell Personnel*, 175 Wis. 2d at 544. No court may substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 108.09(7)(f).

The burden of showing that a commission decision is not supported by substantial and credible evidence is on the party seeking to have the decision set aside. *Xcel Energy Services, Inc. v. LIRC,* 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665. A reviewing court, even though it has the complete record before it, has no authority to make its own findings of fact. *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 536-537, 169 N.W.2d 73 (1969). Here, the commission's factual findings are based on the actual, objective operations of the employers and are supported by substantial and credible evidence in the record. They are, therefore, conclusive on review.

B. The court applies a *de novo* standard of review to the commission's interpretation of law.

The determination of whether the facts, as found by the commission, fulfill a statutory standard is a question of law. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302-303, 558 N.W.2d 874 (Ct. App. 1996). The Wisconsin Supreme Court ended the practice of according deference to an administrative agency's interpretation of law. *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

The ultimate question of whether the employers are "operated primarily for religious purposes" and entitled to an exemption from Wisconsin's unemployment insurance program is dependent upon an interpretation of those terms as envisaged by the legislature and used in Wis. Stat. § 108.02(15)(h)2. Courts review *de novo* questions of statutory interpretation, *Tetra Tech,* 382 Wis. 2d 496, ¶ 84, but will give due weight to an agency's expertise, technical competence, and specialized knowledge where appropriate, *id*., ¶ 3.

II. Under the exemption, the employers are not operated primarily for religious purposes because their activities are secular.

The employers operate for charitable, social services purposes. They rely primarily on government funding to provide programs for individuals with disabilities and individuals in need. They also contract with private companies to

provide services as part of their job training programs. The employers do not require their employees, program participants, or board members to be of the Catholic faith. The employers do not provide the participants with religious materials, training or devotional services and do not try to inculcate the Catholic Faith. (R100:97-98)

The commission correctly determined that the employers are operated primarily for secular social services purposes, not religious purposes. This Court should confirm the commission's decisions.

A. The unemployment insurance law is remedial in nature, designed by the Legislature to provide unemployment benefit coverage to wage earners, and must be interpreted to further the law's purpose.

"Statutes are interpreted in view of the purpose of the statute." *State v. Matasek,* 2014 WI 27, ¶ 13, 353 Wis. 2d 601, 846 N.W.2d 811. Wisconsin's unemployment insurance law embodies a strong public policy in favor of compensating the unemployed. "In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners." Wis. Stat. § 108.01(1). The purpose of the unemployment insurance law is to provide benefits to persons who have lost work through no fault of their own. "Hence, the statute is remedial in nature and should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Princess House, Inc. v. DILHR,* 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983). This Court reaffirmed this construction of the unemployment law in *Operton v. LIRC,* 2017 WI 46, ¶ 32, 375 Wis. 2d 1, 894 N.W.2d 426.

In order to construe the statute broadly in favor of coverage, this Court must narrowly construe the exemption. *McNeil v. Hansen,* 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273. The exemption should be construed "with the general purpose of ch. 108 in mind." *Leissring v. DILHR*, 115 Wis. 2d 475, 484,

340 N.W.2d 533 (1983) and "[T]he burden of proving entitlement to [a tax] exemption is on the one seeking the exemption. 'To be entitled to tax exemption the taxpayer must bring himself within the exact terms of the exemption statute.'"[7] *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa,* 2009 WI App 171, ¶ 7, 321 Wis. 2d 796, 776 N.W.2d 280 (citation omitted).

Here, a narrow interpretation of the exemption is warranted to protect employees' eligibility for unemployment benefits. Benefit eligibility is dependent on wages earned in non-exempt employment during the employee's base period.[8] When a worker's wages are excluded because an employer is exempt, the employee's eligibility for unemployment benefits may be jeopardized or greatly reduced due to insufficient base period wages. This defeats the purpose of the unemployment insurance law, which is to protect wage earners.

Furthermore, unemployment insurance is a joint federal-state program. Federally-funded benefits provide additional assistance in times of high unemployment, but employees who are ineligible for regular unemployment insurance benefits do not qualify, in most instances, for additional federal assistance. The additional federal assistance, like other unemployment insurance benefits, is not only essential for the welfare of unemployed workers, but also to the economic vitality of the state. "The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state." Wis. Stat. § 108.01(1).

The employers assert that the parties agree that the Catholic Church Unemployment Program ("CCUP") provides equivalent benefits to the State's system. (Employers' brief 18 and 47) This is false. First, the CCUP system is not integrated into the State system. Employees in the CCUP system would not

[7] Unemployment taxes are excise taxes. *U.S. v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 204, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001).

[8] A claimant's base period is generally the first four of the five most recently completed calendar quarters. Wis. Stat. § 108.02(4).

receive credit from the State for wages earned in exempt employment, resulting in no, or reduced, benefits. Furthermore, while part-time employees who worked fewer than 20 hours a week or employees who are furloughed may be eligible for benefits under Wis. Stat. ch. 108 based on wages earned from nonexempt employers, such employees are not eligible for benefits from CCUP. (R60:2-4) The state program also provides additional benefits in time of high unemployment.[9]

This Courts' interpretation of the subdivision will be applicable to all religiously-affiliated organizations and thus the CCUP program is "immaterial." *See Catholic Charities,* ¶ 38. ("This argument is a nonstarter. Whether an organization provides private unemployment insurance to its employees is not a factor under the religious purposes.") Wisconsin Stat. § 108.02(15)(h)2. must be interpreted narrowly to implement the remedial goals of chapter 108 so that employees of organizations such as the five employers receive unemployment benefits when they lose their jobs through no fault of their own.

B. The commission's decisions interpret the statute to fulfill the remedial goals of Wis. Stat. ch. 108.

1. The Court's focus must be on the employers' purposes, as shown by their activities.

The employers rewrite the exemption as applying to an organization "[managed or used] primarily for religious purposes [of a church.]" (Employers' brief 33) Their interpretation is contradicted by the language of the statute, adds words to the statute, would render the language at issue surplusage, and is inconsistent with the legislative history.

Statutory interpretation begins with the language of the statute. "Statutory language is given its common, ordinary and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Context is also important. *Id*. ¶ 46.

[9] Wis. Stat. §§ 108.141 and 108.142.

"Employment" is defined as any service performed by an individual for pay. Wis. Stat. § 108.02(15). Wisconsin Stat. § 108.02(15)(h) provides that employment, as applied to work for a nonprofit organization, does not include service performed in three separate instances. Under subdivision 1., employment does not include service performed for a church. Under subdivision 2., employment does not include service performed for entities meeting the two separate conditions in the subdivision. Under subdivision 3., employment does not include service performed as a minister. For each of these subdivisions, the noun phrase "employment as applied to work for a nonprofit organization" is the subject and "does not include" is the verbal phrase. "Service" combined with each of the three subdivisions are noun phrases that constitute the direct object.

The court of appeals defined "operate" as "to work, perform, or function," "to act effectively; produce an effect; exert force or influence," or "to perform some process of work or treatment." *Catholic Charities,* ¶ 23 (citing *Operate,* https://www.dictionary.com/browse/operate) The court thus held that the term "'operate' connotes an action or activity." *Id.* The actions and activity are the services performed by the employers' employees.

The employers incorrectly argue that "operate" is a transitive verb in the "religious purposes" clause and thus the court of appeals used the wrong definition. "Operate" may be used as either a transitive or intransitive verb. When used as an intransitive verb, "operate" does not take a direct object, "although [an intransitive verb] may be followed by a prepositional phrase serving an adverbial function." Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation,* p. 71 (2016). (Supp-App. 4) In the phrase "organization operated primarily for religious purposes," "operated" is an intransitive verb and "primarily for religious purposes," is a prepositional phrase. *See, e.g., Union Tank Line Co. v. Richardson*, 183 Cal. 409, 412, 191 P. 697 (1920), (holding that "operate" was used intransitively in the statutory phrase "taxes levied upon railroads … including

other car-loaning and other car companies **operating upon railroads** in this state…." (emphasis added)).

The intransitive use of "operated" in the exemption is illustrated by substituting an adverb such as "legally" for the phrase "for religious purposes." However, if "operated" were used as a transitive verb, the sentence would need a direct object. To make "operated" a transitive verb as the employers contend, the sentence would need to be written as "the church operated the organization." But that is not what the statute says.

The next word, "primarily," means "essentially; mostly; chiefly; principally" or "in the first instance; at first; originally." *Catholic Charities,* ¶ 23 (citing *Primarily,* https://www.dictionary.com/browse/primarily). Primarily is followed by "purposes," which has several definitions. Because the employers are corporations, Black's Law Dictionary (11th ed. 2019) provides an appropriate definition of "purpose:" "[a]n objective, goal, or end; specif., the business activity that a corporation is chartered to engage in." The court of appeals stated that "[p]urpose" is also defined as "the reasons for which something exists or is done, made, used, etc." or "an intended or desired result; end; aim; goal." *Catholic Charities*, ¶ 23, citing *Purpose*, https://www.dictionary.com/browse/purpose. "Purpose can also mean 'something that one sets before himself [or herself] as an object to be attained' and 'an object, effect, or result aimed at, intended, or attained.'" *Id.,* citing *Purpose*, Webster's Third New Int'l Dictionary (unabr. 1993).

The key issue is the proper definition of "purposes." The employers' business activity, objectives, goals and ends are the provision of secular social services. The activities of the employers are properly considered to determine their purposes because the employers' "activities provide a useful indicia of the organization's purpose or purposes." *Living Faith, Inc. v. C.I.R.,* 950 F.2d 365, 372 (7th Cir. 1991). In this case, the employers operate to provide social services,

and their activities accomplish, through their employees' services, the employers' social services objectives or purposes.

Focusing on the employers' activities to determine their purpose is consistent with statutes restricting the use of public monies that state: "Limitations on use of funds for certain *purposes*. No funds provided directly to religious organizations by the [governmental entity] may be expended for sectarian worship, instruction, or proselytization." Wis. Stat. §§ 46.027(9), 49.114(9), 59.54(27)(j) and 301.065(9) (emphasis added). These statutes define impermissible **purposes** as certain religious **activities**.

By considering the employers' activities, this Court can determine if the employers fall within the unemployment exemption. This Court conducted such an analysis to determine if a labor union's **activities** brought it within an exempt **purpose** under Wis. Stat. § 108.02(5)(g)(7) (1942-43) in *International Union v. Industrial Comm.*, 248 Wis. 364, 372, 21 N.W.2d 711 (1946). The statute at issue exempted "[e]mployment of any person by a corporation … organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes …." This Court considered the uses of the union's income, and because the bulk of it was spent to carry out its collective bargaining contract, the union did not fall within the exemption.

Here, because the employers' activities and use of its funds is to provide secular social services, the employers are not operated for religious purposes.

2. Consideration of the church's purpose instead of the employers' purposes would require rewriting the statute and impermissibly render the "purposes" clause surplusage.

The court of appeals considered the employers' purpose, not the church's, because the exemption only applies to the employers' employees. *Catholic Charities,* ¶ 25. The court of appeals' analysis is supported by the structure of subdivision 2. It is the nonprofit organizations' employees' services, not the church employees' services, which are "not included" as employment.

Furthermore, a qualifying phrase refers to the next preceding antecedent unless the context or evident meaning require otherwise. *Fuller v. Spieker*, 265 Wis. 601, 605, 62 N.W.2d 713 (1954). When considering the qualifying phrase "operated primarily for religious purposes," the next preceding antecedent, the employing organization, should be considered and not the church.

The employers' argument, that the church's purpose must be considered, ignores that subdivision 2. specifically contemplates that a nonprofit may be principally supported by a church but not operated by the church. *See, e.g., MHS, Inc.*, UI Dec. Hearing No. 8852, S (LIRC July 12, 1991)(Supp-App. 7). To ensure the entire subdivision has meaning in all cases, this Court must focus on the activities of the nonprofit organizations in determining their purposes.

The employers are only able to achieve their desired result by inserting "of a church" after "purposes." (Employers' brief 33) However, the legislature did not write the statute that way; this Court rejects statutory interpretations that add words to the statute. *See, Bruno v. Milwaukee Cnty*., 2003 WI 28, ¶ 16, 260 Wis. 2d 633, 660 N.W.2d 656.

The employers' argument on pages 9 and 31 of their brief, that it is undisputed the Diocese operates CCB for a religious purpose, is misleading. To make this argument, the employers define purpose as "reason." The Diocese's reason or motive for creating the employers to serve as a social ministry arm of the church may have a religious connection, but the ends to be accomplished by the individual employers through their employees' services—in other words, their "purposes"—is the provision of social services. The employers also incorrectly assert that it is undisputed that the requirement of a primarily religious purpose says nothing about the types of permitted activities. (Employers' brief 35) However, the department and commission's position has been that the employers' activities must be religious to fall within the scope of the statute.

The court of appeals also held that, if the church's purpose were considered, it would render the "religious purposes" clause unnecessary. *Catholic*

Charities, ¶ 26. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal,* 271 Wis. 2d 633, ¶ 46. The employers respond that the religious purpose clause asks "why" the organization is operated. But this proves the court of appeals' point: Why would a religious organization set up a nonprofit affiliate except if motivated by its religious mission? Under the employer's interpretation, a religiously-affiliated nonprofit would always be exempt and the clause rendered surplusage.

Moreover, as demonstrated by the employers' brief at pages 14-15 and 37-38, answering the question of why the organization operated, that is looking for the motive, requires an interpretation of religious beliefs. Such an inquiry is constitutionally impermissible. "It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices." *L.L.N. v. Clauder,* 209 Wis. 2d 674, 687, 563 N.W.2d 434 (1997). However, in conducting a neutral and secular inquiry of whether schools are affiliated with the same religious denomination, "the professions of the school with regard to the school's self-identification and affiliation" may be considered. *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 5, 398 Wis. 2d 92, 961 N.W.2d 635. It is also permissible to consider whether an employer's actual practice shows a fundamentally religious mission for purposes of an exception to the Fair Employment Act. *Coulee,* 320 Wis. 2d 275, ¶¶ 48, 72-75. Similarly, the commission's neutral and secular review based on the employers' professions of their activities does not require an interpretation of "church law, policies or practice."

Finally, the commission rejected an approach looking solely at an entity's motivation or reasons, because it would allow the organization to determine its own status without regard to its actual function. (R55:10) Such an approach would render the clause unnecessary and contrary to the requirement that the exemption be construed narrowly. *Catholic Charities,* ¶ 37. The Legislature could have written an exemption that excluded **all** nonprofit entities affiliated with

a religious organization, by omitting the clause "operated primarily for religious purposes." Because it chose to include the limiting clause, this Court must interpret the statute to give it meaning.

C. Wisconsin unemployment laws must be interpreted consistent with the Federal Unemployment Tax Act.

Federal funding of Wisconsin's unemployment program is contingent on Wisconsin's law conforming to federal unemployment law and Wisconsin's administration of its program substantially complying with federal law. 20 C.F.R. §§ 601.2(d) and 601.5. *See also City of Milwaukee v. DILHR,* 106 Wis. 2d 254, 260, 316 N.W.2d 367 (1982).

Wisconsin Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin's unemployment law to 26 U.S.C. § 3309(b)(1)(B) of the Federal Unemployment Tax Act ("FUTA"). 1971 Wis. Laws, ch. 53, § 6. *See* 1971 S.B. 330 and *Resurrection Cemetery and Mt. Olivet Cemetery, Inc. v. DILHR*, No. 149-083 (Wis. Cir. Ct. Dane Cty., June 9, 1976) (Supp-App. 13, 21-22 & 25). A Congressional Committee Report discusses the Legislature's intent of the federal religious exemption in 26 U.S.C. § 3309(b)(1)(B). "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. U.S.,* 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (citation omitted).

The court of appeals properly referred to the Report because a court may look to legislative history to confirm the plain meaning. *Teschendorf v. State Farm Ins. Co.,* 2006 WI 89, ¶ 14, 293 Wis. 2d 123, 717 N.W.2d 258. The "purpose in doing this is merely to contribute to an informed explanation that will firm up statutory meaning." *Id.* Furthermore, given the conflict among the other jurisdictions as noted in *Catholic Charities,* ¶ 28 n.10, this Court should determine that the statute is ambiguous and consult its legislative history.

This Court has relied on Congressional Committee Reports on bills amending FUTA when interpreting Wisconsin laws enacted to conform with

FUTA. *Leissring,* 115 Wis. 2d at 485-488.[10] Because Wis. Stat. § 108.02(15)(h)2. was enacted to conform Wisconsin law to federal law, the Congressional Committee Report on the bill amending FUTA informs the interpretation of the Wisconsin statute. The Committee Report explains the intent of the federal exclusion:

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, **a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.**

H.R. Rep. No. 91-612, p. 44 (1969) (emphasis added) (Supp-App. 39).

The U.S. Supreme Court cited this portion of the report as indicative of the intended coverage of the exemption under 26 U.S.C. § 3309. *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 781, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981).[11] The Committee Report distinguishes between employers engaged in religious activities, such as colleges preparing students for the ministry, which are considered to be operated primarily for religious purposes, from church-related charitable organizations, which are not engaged in religious activities, such as an orphanage or a home for the aged, and **not** considered to be operated primarily for religious purposes. Here, the employers are separately incorporated charitable organizations that provide secular social services, not religious instruction. Like an orphanage or home for the aged, they are **not**

[10] This Court has referenced external sources interpreting FUTA to interpret Wisconsin statutes conforming with FUTA. *See DILHR v. LIRC,* 161 Wis. 2d 231, 247-48, 467 N.W.2d 545 (1991).
[11] In *St. Martin,* the court considered whether church-affiliated schools that have no separate legal existence from a church are exempt from FUTA.

considered to be operated primarily for **religious** purposes. The commission's activity-focused inquiry is consistent with the Report.

D. The implementing regulations and federal court decisions reviewing "religious purposes" to determine tax exempt status under the federal tax code provide persuasive authority for examining the activities of the organization.

This Court has found federal cases interpreting statutes identical, or similar, to Wisconsin statutes to be persuasive authority for interpreting Wisconsin law. *See, e.g., Industrial Comm. v. Woodlawn Cemetery Ass'n,* 232 Wis. 527, 287 N.W. 750 (1939) and *Ladish Co. v. DOR*, 69 Wis. 2d 723, 733-34, 233 N.W.2d 354 (1975).

Because the Wisconsin exemption is based on a provision in the federal tax code, guidance for interpreting "operated primarily for religious purposes" is provided by cases applying 26 U.S.C. § 501(c)(3) of the tax code and its implementing regulations. Under the tax code, "[c]orporations … organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes…." are exempt from federal taxation. The tax code regulations instruct that "an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." 26 C.F.R. § 1.501(c)(3)-1(c)(1). Under the regulations, organizations that are exempt for religious, charitable, scientific, testing for public safety, literary, or educational purposes are those organizations that are primarily engaged in religious, charitable, scientific, testing for public safety, literary, or educational activities.

The court of appeals properly relied on a Seventh Circuit decision in analyzing the religious purposes exemption. In *U.S. v. Dykema,* the Seventh Circuit instructs that the "term 'religious purposes' is simply a term of art in the tax law" and that the IRS determines whether an entity's "actual activities conform

to the requirements" for being tax exempt. *U.S. v. Dykema,* 666 F.2d 1096, 1101 (7th Cir. 1981). To determine if an organization's actual activities conform to the statutory requirements for exemption, "it is necessary and proper for the IRS to survey all the activities of the organization, in order to determine whether what the organization in fact does is to carry out a religious mission or to engage in commercial business." *Id.* at 1100. The appropriate review "could be made by observation of the organization's activities or by the testimony of other persons having knowledge of such activities, as well as by examination of church bulletins, programs, or other publications, as well as by scrutiny of minutes, memoranda, or financial books and records relating to activities carried on by the organization." *Id.*

The Seventh Circuit also held that "[t]ypical activities of an organization operated for religious purposes would include:"

> (a) corporate worship services, including due administration of sacraments and observance of liturgical rituals, as well as a preaching ministry and evangelical outreach to the unchurched and missionary activity *in partibus infidelium*; (b) pastoral counseling and comfort to members facing grief, illness, adversity, or spiritual problems; (c) performance by the clergy of customary church ceremonies affecting the lives of individuals, such as baptism, marriage, burial, and the like; (d) a system of nurture of the young and education in the doctrine and discipline of the church, as well as (in the case of mature and well developed churches) theological seminaries for the advanced study and the training of ministers.

Id. The Seventh Circuit explained that examining "an organization's activities thus enable[s] the IRS to make the determination required by the statute without entering into any subjective inquiry with respect to religious truth which would be forbidden by the First Amendment." *Id.*

In a later decision, the Seventh Circuit reaffirmed the importance of examining an organization's activities to avoid any subjective inquiry. *Living Faith,* 950 F.2d at 376. Similarly, here, an examination of employers' activities is necessary to determine whether their activities conform to the exemption from Wisconsin's unemployment insurance law under Wis. Stat. § 108.02(15)(h)2.

E. The commission and court of appeals appropriately relied on *Coulee* to determine if the employers are operated primarily for religious purposes.

The court of appeals held that the analysis in *Coulee* "provides guidance in understanding the religious purposes exemption." *Catholic Charities,* ¶ 43. In *Coulee,* this Court analyzed whether a school association had a fundamentally religious mission to determine whether a teacher's discrimination claim was precluded by the Free Exercise clause in the U.S. Constitution under the "ministerial exception" to anti-discrimination laws. The "ministerial exception" protects a church's free exercise rights from governmental interference with a church's selection of those positions important to its spiritual and pastoral mission. *Coulee*, 320 Wis. 2d 275, ¶ 45.

To determine whether the teacher's position was ministerial, this Court conducted a two-step, functional analysis. First, a court must determine if the organization, in both statement and practice, has a fundamentally religious mission; "[t]hat is, does the organization exist primarily to worship and spread the faith?" *Id.* ¶ 48. This court explained that:

> It may be, for example, that one religiously-affiliated organization committed to feeding the homeless has only a nominal tie to religion, while another religiously-affiliated organization committed to feeding the homeless has a religiously infused mission involving teaching, evangelism, and worship. Similarly, one religious school may have some affiliation with a church but not attempt to ground the teaching and life of the school in the religious faith, while another similarly situated school may be committed to life and learning grounded in a religious worldview.

Id. The decision's distinguishing of organizations based on their activities parallels the analysis in the Federal Committee Report.

Under *Coulee,* if the organization has a fundamentally religious mission, "[t]he second step in the analysis is an inquiry into how important or closely linked the employee's work is to the fundamental mission of that organization." *Id.* ¶ 49. This inquiry considers several factors, including whether the individual

performs quintessentially religious tasks, such as evangelizing, participating in religious rituals, worship, or worship services.

Coulee informs the interpretation of the unemployment exemption because determining whether an organization has a fundamentally religious mission is analogous to determining whether the organization is operated for primarily religious purposes. The exemption in Wis. Stat. § 108.02(15)(h) also excludes individuals employed by a church,[12] and ministers and members of a religious order.[13] *Coulee* illustrates how employees working for an employer engaged in quintessentially religious activities may be analogous to church employees and ministers.

The employers assert that *Coulee* is distinguishable but do not explain why those distinctions mean *Coulee's* functional analysis should not be considered for purposes of defining the religious purposes exemption. Focusing on an employer's activities, rather than the church's reasons or motivation, appropriately balances employees' ability to obtain unemployment benefits against religious organizations' need to be free from governmental interference in their selection of positions important to their spiritual and pastoral mission. Accordingly, *Coulee* provides guidance on whether an organization is operated primarily for religious purposes and supports the commission decisions.

F. The commission and court of appeals appropriately determined that the employers are not operated primarily for religious purposes.

Contrary to the employers' assertion at page 34 of its brief, the court of appeals did not recognize that CCB and its sub-entities' purposes are primarily religious. The court did acknowledge a religious *motivation* of CCB's work and to a lesser degree in the sub-entities' own work. *Catholic Charities,* ¶ 57.

The commission found that the employers were not operated primarily for religious purposes by considering whether the employers' activities conform to the

[12] Wis. Stat. § 108.02(15)(h)1.
[13] Wis. Stat. § 108.02(15)(h)3.

requirements which the Legislature has established as entitling them to an exemption from the unemployment laws. The commission determined that the employers are akin "to the religiously-affiliated organization committed to feeding the homeless that has only a nominal tie to religion." (R55:8, 17, 24, 33 and 41)

The objectives, goals and ends which the employers seek to achieve through their employees' services as shown by their IRS Form 990s and websites, are the provision of social services and are described in the employers' mission statements to the Internal Revenue Service:

- Serving developmentally disabled citizens. (R64:2)
- Provide services to individuals with developmental disabilities. (R65:18)
- Provide employment activities to individuals with disabilities. (R65:58)
- In partnership with the community, to provide people with disabilities opportunities to achieve the highest level of independence. (R66:20)
- To alleviate human suffering by sponsoring direct service programs for the poor, the disadvantaged, the disabled, the elderly, and children with special needs. (R61:52)

BCDS was formerly an independent agency without any religious affiliation (R100:233-234) that later became affiliated with CCB. BCDS provides sheltered workshops for individual with disabilities. (R100:108 and 65:17-18) The organization operated the same way before and after its affiliation with CCB. (R61:1-2 and R100:236-37) The purposes of the organization's operations did not transform from secular to religious simply as a result of the business transfer.

BRI provides job training programs and services for individuals with disabilities and individuals with limited incomes. (R66:19-20 and R100:252-254, 275) DSI provides work opportunities for individuals with disabilities and supports them in community jobs. (R65:48-58 and R100:240-241) Headwaters primarily serves individuals with developmental disabilities and teaches them life and work skills. (R64:1-2 and R100:206, 211)

CCB provides administrative services to its affiliated agencies. CCB's social services include subsidized housing for income-eligible seniors, individuals

with disabilities, and individuals with mental illness. (R62:29-47, 55 and R100:173-174) CCB also provides home healthcare services, and daycare services for the elderly and for children. (R62:1-15 and R100:103-107, 177-178)

"[T]he activities of CCB and its sub-entities are the provision of charitable social services that are neither inherently or primarily religious activities." *Catholic Charities,* ¶ 58. The employers do not operate to inculcate the Catholic faith. (R100:98) They are not engaged in teaching the Catholic religion, evangelizing, or participating in religious rituals or worship services with program participants. (R100:99-100) Their employees, participants, and board members are not required to be of the Catholic faith. (R100:92, 187, 219, 233 and 287-288) The commission's findings that the employers are operated primarily to administer social service programs (R55:21) and to provide social services is supported by substantial, credible evidence. (R55:5, 13, 29 and 38) Accordingly, the employers are not operated primarily for religious purposes.

The commission's functional approach, which considers the employers' activities, is consistent with the language of the statute, the Congressional Committee Report, *Coulee*, and persuasive Seventh Circuit decisions. It gives meaning to all parts of the statute and avoids any unconstitutional entanglement. The commission's decisions should be confirmed.

III. The denial of the unemployment tax exemption to the employers does not violate the U.S. or Wisconsin Constitutions.

The employers raise three First Amendment challenges to the commission's and court of appeals' decisions, each of which overreaches the bounds of First Amendment protections. They raise "as applied" challenges and thus must prove that the denial of the unemployment exemption is unconstitutional beyond a reasonable doubt. *State v. Smith*, 2010 WI 16, ¶¶ 8-9, 323 Wis. 2d 377, 780 N.W.2d 90 (citations omitted).

The commission's and court of appeals' decisions do not interfere with the Diocese's internal governance or restrict its ability to fulfill its religious mission.

The statute, as interpreted and applied by the commission and court of appeals, does not burden the Diocese's sincerely held religious beliefs. The decisions do not deny the employers a generally available benefit. A neutral, objective review of the employers' activities will not result in an unconstitutional entanglement in religious affairs. The commission and court of appeals simply require that laws of general application, the unemployment insurance laws, be applied to the employers.

A. The commission's and court of appeals' decisions do not intrude on internal church governance.

The employers assert that the commission's interpretation interferes with church autonomy principles. (Employers' brief 40) However, while the commission and court of appeals recognized that the employers are separately incorporated legal entities, their decisions do not effectuate a severance of the employers from the Diocese and do not interfere with the Diocese's autonomy. In contrast, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the challenged statute transferred the control of the New York churches of the Russian Orthodox religion to the governing authorities of the Russian Church in America and thus actually interfered with the governing structure of the church. Here, neither the court of appeals nor the commission determined who had possession or control of church property in contrast to the issues presented in the cases cited on pages 41 and 42 of the employers' brief.

In support of its internal church autonomy argument, the employers also rely on cases regarding the "ministerial exception" to employment discrimination laws. The ministerial exception, also discussed in *Coulee*, protects religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission" and preserves a church's authority to remove a minister without interference by secular authorities. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060, 207 L. Ed. 2d 870

(2020). The religious institutions' autonomy in deciding "matters of church government" "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2060. Similarly, *Coulee* found that although Wis. Const. art. I, § 18 does not permit the application of the State's anti-discrimination laws to ministerial employees, general laws related to taxes and social security are normally acceptable. *Coulee,* 320 Wis. 2d 275, ¶ 65.

The employers incorrectly assert that everyone agrees that CCB is part and parcel of the Catholic Church. (Employers' brief 41) In fact, the employers are separately incorporated. Thus, under the statute, the employers' employees are not considered church employees. If the entities were not separately incorporated and the employees were church employees, the employees would be exempt under Wis. Stat. § 108.02(15)(h)1., which exempts church employees. The employers incorrectly assert that everyone agrees that the reason CCB and its sub-entities administer their social services programs is for a religious purpose. (Employers' brief 41-42) The department and the commission do not agree that the employers are operated for religious purposes because, under the unemployment law, the employers are operated for secular social services purposes.

Requiring unemployment insurance coverage for laid off workers is simply not comparable to a court infringing on a church's authority to select its ministers and religious educators. The Diocese and the employers remain free to determine their corporate structure and to determine who plays key roles in their respective organizations while participating in the unemployment program. Accordingly, the application of the unemployment insurance law is permissible under both the Wisconsin and the United States Constitutions.

B. The commission's and court of appeals' decisions do not violate the Free Exercise Clause.

1. Chapter 108 is a neutral law of general application that does not burden sincere religious beliefs.

"The Free Exercise Clause inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). Neutral laws of general application that only incidentally burden religion are not subject to strict scrutiny. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021). A party may carry its burden of proving a free exercise violation by showing that a government entity has burdened a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22, 213 L. Ed. 2d 755 (2022). A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

Here, the employers' purported burden, the unemployment insurance laws, are neutral and generally applicable and do not target religious practices. *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 880, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (The Social Security law is a "neutral, generally applicable regulatory law") *citing U.S. v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982). In contrast, the cases cited by the employers involve prohibitions imposed on specific religious activities. For example, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 538-39, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), the City prohibited, for public health reasons, the animal sacrifice practice of the Santeria religion. The Court found the City's ordinance was not neutral because it resulted in a "flat prohibition" on the targeted religious practice even when it did not threaten public

health interests. *Id.* *Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953) involved a Jehovah's Witness minister who was prohibited from speaking in a public park when other religions' church services could be held in the park.

The commission's interpretation does not prohibit the Diocese or the employers from engaging in any activity. The employers have participated in the State unemployment insurance program for many years and do not contend that their participation was a significant or substantial burden on their religious practices or beliefs. "[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Found. v. Sec'y Labor*, 471 U.S. 290, 303, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

The employers have not asserted that they have a sincere religious belief against the payment of unemployment insurance taxes or against the provision of unemployment benefits to unemployed workers. They assert that they would save funds if they were to switch to the church program. CCB's former Chief Financial Officer believed that their own program "was more efficient and dealt more directly with the people that were eligible." (R100:123) His testimony does not establish any cost savings.

Moreover, although the statute requires that the employers pay for their employees' unemployment benefits, any burden from the payment of a "generally applicable" sales and use tax is not "constitutionally significant." *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 391, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). Similarly, it is doubtful that the denial of an income tax deduction constitutes a substantial burden. *Hernandez,* 490 U.S. at 699. To support their assertion that the commission is subjecting the employers to "worse treatment than other religious ministries," the employers would need to

show a burden. Under the law, their inclusion in the unemployment program is not a constitutionally significant burden.

The employers assert that an "otherwise-available" exemption was denied because of Catholic religious doctrine. (Employers' brief 45-46) The state may not exclude members of the community from an otherwise generally available public benefit because of their religious exercise. *Carson v. Makin,* 142 S. Ct. 1987, 1998, 213 L. Ed. 2d 286 (2022). A free exercise violation occurs if a person or organization, due to their religious status, is deprived of a benefit or right that is otherwise available to a secular person or organization such as when religious schools cannot participate in voucher programs available to secular schools simply because they are religious schools. In contrast, almost all employers are required to pay unemployment insurance taxes to fund their employees' benefits and exemptions are not a generally available public benefit.

The commission and court of appeals' interpretation of Wis. Stat. § 108.02(15)(h)2. does not prohibit "religious conduct while permitting secular conduct that undermines" the same governmental interest. *Kennedy*, 142 S. Ct. at 2422. Instead, because the employers provide a charitable or social service with no overt religious activity, they are treated the same as secular nonprofit entities that provide the same services: they both must pay the unemployment insurance tax on employees of the organizations offering the services.

The employers assert that the court of appeals' decision favors religious groups who service only individuals of their faith or proselytize. (Employers' brief 46) A statute is invalid if it clearly grants denominational preferences. *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 33 (1982). Unlike the statute at issue in *Larson,* there is no evidence that the unemployment exemption was drafted to target specific religions and the law "makes no 'explicit and deliberate distinctions between different religious organizations.'" *Hernandez*, 490 U.S. at 695 (citation omitted).

Moreover, in an as-applied challenge, courts assess the merits of the challenge on the facts of the particular case before it, "not hypothetical facts in other situations." *State v. Hamdan,* 2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785; *State v. Wood,* 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. Here, most of the employers' funding is from governmental entities. Based on the restrictions for the use of public funds, it is highly doubtful that a religious group could use state and federal funding to proselytize and provide social services. (R100:96 and 155)

The employers contend that the U.S. Supreme Court "treated CSS and the Archdiocese as effectively the same entity" in *Fulton*. In *Fulton*, although the Court may have conflated the two, it did not do so under a statute that requires a church and any affiliated agencies to be considered separately like subdivisions (15)(h)1. and 2. require. *See Catholic Charities*, ¶ 60.

The employers have not shown that the unemployment insurance system burdens their religious beliefs. The unemployment insurance tax law remains a law of general or neutral application even though it permits exemptions for religious activities. *See Hernandez,* 490 U.S. at 700 and *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015). Accordingly, the application of the unemployment system to the employers does not violate the Free Exercise clause.

2. Chapter 108 is a neutral law of general applicability that withstands strict scrutiny.

The unemployment laws do not need to satisfy a strict scrutiny analysis because the employers have not shown that the unemployment laws have burdened a sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Kennedy*, 142 S. Ct. at 2422. Nevertheless, chapter 108 withstands a strict scrutiny analysis. In order to satisfy a strict scrutiny analysis, the government must demonstrate "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.*

The first step under a strict scrutiny analysis is determining whether there is a compelling state interest. *Id.* The compelling state interest is set forth in Wis. Stat. § 108.01, that recognizes that covering workers in the unemployment insurance program is important for both wage earners and the economic health of the state. "Each employing unit in Wisconsin should pay at least a portion of this social cost [of unemployment] of its own irregular operations by financing benefits for its own unemployed workers." Wis. Stat. § 108.01(1). The purpose of the act—compensation for loss of earnings by workers—must be given great—even controlling—effect, in determining who are employees under the act as it is the employees who are to receive the compensation provided for and an "employee" must work in an "employment" to be eligible for the benefits. *Princess House,* 111 Wis. 2d at 62. The broad public interest in maintaining a sound tax system is of such a high order, a religious belief in conflict with the payment of taxes affords no basis for resisting the Social Security tax. *U.S. v. Lee*, 455 U.S. at 260. Wisconsin has a compelling interest in providing broad unemployment insurance access to workers and satisfies this part of the strict scrutiny analysis.

The second step is determining whether the law is narrowly tailored and the least restrictive possible. The U.S. Supreme Court has upheld taxes imposed on religious organizations, even if the tax imposes a burden, because it is impossible to construct workable tax laws that account for the "myriad of religious beliefs."

> The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. … Religious beliefs can be accommodated, … but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."

U.S. v. Lee, 455 U.S. at 259 (citation omitted). Thus, in *Lee,* the imposition of the Social Security tax was constitutional although the tax was inconsistent with the plaintiff's sincerely held religious beliefs. *Id.* The Supreme Court similarly upheld taxes in *Hernandez* (income tax) and *Swaggart* (sales and use tax).

The employers assert that under *Fulton*, the commission may not refuse to extend the statutory exemptions for church employees and ministers to "cases of religious hardship." (Employers' brief 47-48) In *Fulton*, without an exemption, the organization would have needed to act contrary to its religious beliefs to contract with the City. Here, the employers have not even contended that the unemployment tax burdens their sincerely held beliefs. Moreover, in *Fulton*, the denial of an exemption resulted in harm to third parties: children requiring foster care. *Fulton,* 141 S. Ct. at 1886-87 (Alito, J. concurring). In contrast, here, the grant of an exemption results in harm to third parties: employees needing unemployment benefits.

The broad exemption the employers seek would defeat the purpose of the unemployment law to provide coverage to as many workers as possible. Under *Lee, Hernandez,* and *Swaggart*, the limited exemption provided to nonprofit corporations that are engaged in religious activities is constitutionally permissible under the First Amendment.

Based on its First Amendment arguments, the employers also assert a violation of Wis. Const. art. 1, § 18. (Employers' brief 39) Under the Wisconsin Constitution, the employers must prove that their sincerely held religious beliefs have been burdened by the application of the unemployment insurance laws, which they have not proven. *James v. Heinrich,* 2021 WI 58, ¶¶ 39, 43, 397 Wis. 2d 517, 960 N.W.2d 350 (County order closing schools burdened the exercise of religious practices by precluding religious expression and practice). Furthermore, this Court has held that laws related to "taxes, social security, and the like are normally acceptable." *Coulee,* 320 Wis. 2d 275, ¶ 65. Accordingly, the application of the unemployment laws to the employers is also permissible under the Wisconsin Constitution.

C. The commission's and court of appeals' decisions do not violate the Establishment Clause.

The employers assert that the commission's interpretation results in impermissible entanglement because it will require the courts and the government to conduct an intrusive inquiry into the beliefs, practices and operation of religious organizations. (Employers' brief 49) The neutral review of the employers' activities based on their statements does not constitute excessive entanglement.

"Excessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.'" *St. Augustine Sch.*, 398 Wis. 2d 92, ¶ 43. This Court found that the First Amendment prohibited a claim against a diocese for the negligent supervision of a priest because the claim could not be resolved on neutral principles but would require the court to interpret church law, policies, and practices. *L.L.N.,* 209 Wis. 2d at 698. In contrast, a determination of whether an organization's activities entitle it to a tax exemption can be resolved on neutral principles and does not require a court to interpret church doctrine. "Qualification for tax exemption is not perpetual or immutable" and "some tax-exempt groups lose that status when their **activities** take them outside the classification." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (emphasis added).

Tax exemptions are matters of legislative grace. *Dominican Nuns v. La Crosse*, 142 Wis. 2d 577, 579, 419 N.W.2d 270 (Ct. App. 1987). The taxpayer has the burden of demonstrating entitlement thereto. *Wauwatosa Ave. United Methodist Church*, 321 Wis. 2d 796, ¶ 7. If an examination of an organization's religious activities were not permitted, "it is difficult to see how any church could qualify as a tax-exempt organization 'for religious purposes.'" *Dykema,* 666 F.2d at 1102.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) does not immunize the employers from a determination of whether their activities entitle

them to the unemployment exemption. *Amos,* consistent with the ministerial exception discussed above, upheld the religious exemption to federal anti-discrimination laws to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. A neutral review of the employers' activities does not constitute a significant interference with the Diocese's religious mission.

If such a review were constitutionally impermissible, the government would need to rely on the association or individual's assertion alone. In *Christian Echoes Nat. Ministry, Inc. v. U.S.,* 470 F.2d 849, 856 (10th Cir. 1972), the court rejected Christian Echoes' argument that, for purposes of section 501(c)(3), the First Amendment forbids the government and courts from deciding whether activities are political or religious because "we would be compelled to hold that Congress is constitutionally restrained from withholding the privilege of tax exemption whenever it enacts legislation relating to a nonprofit religious organization." "Such conclusion is tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered." *Id.*

Furthermore, as explained by *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997): "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." Examples provided by *Agostini* that did not raise constitutional concerns included: "*Bowen v. Kendrick,* 487 U.S., at 615–617, 108 S. Ct., at 2577–2579 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764–765, 96 S. Ct. 2337, 2353–2354, 49 L.Ed.2d 179 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state

grants to religious colleges are not used to teach religion)." *Agostini*, 521 U.S. at 233.

Under the commission's decisions, Wis. Stat. § 108.02(15)(h)2. does not require an interpretation of church law but rather an objective review of an entity's activities. *See Dykema*, 666 F.2d at 1100-01. Such a review is consistent with a court's review of an organization's activities for purposes of determining the ministerial exception. For example, *Coulee* espoused a fact-sensitive inquiry to determine if an employee performs quintessentially religious tasks evincing a close link to an organization's religious mission, by looking at activities as "[t]eaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services." *Coulee,* 320 Wis. 2d 275, ¶ 49. Similarly, the U.S. Supreme Court conducts a fact-based inquiry into whether an employee performs "vital religious duties" for analyzing the ministerial exception. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064 and 2066. *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (one reason a teacher was covered by the ministerial exception was the "important religious functions" the teacher performed for the Church).

Most Wisconsin employers must participate in the unemployment system. The First Amendment does not provide religiously affiliated organizations the ability to decide whether they will comply with chapter 108. The First Amendment does not "foreclose a court from analyzing a church's activities" to determine whether those activities fall within statutory terms. *U.S. v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983). In short, it does not offend the constitution to conduct a neutral, fact-based inquiry into whether an entity operates for religious purposes. The commission's analysis of the employers' activities is consistent with the fact-based inquiries undertaken in *Dykema, Coulee*, *Our Lady of Guadalupe Sch*. and *Hosanna-Tabor* and is not unconstitutional.

D. The employers fail to show any actual First Amendment implications by the application of the unemployment insurance laws to them.

Each of the employers' constitutional arguments is based on an overreach of First Amendment jurisprudence. The court of appeals' decision, the commission's decisions, and the statute do not violate church autonomy and do not burden the free exercise of any religious practice. Finally, applying the statute properly, with an examination of the employers' activities, does not result in excessive entanglement.

CONCLUSION

The ultimate issue before this Court is whether the employers met their burden to establish that, unlike most employers in the state, they are exempt from participating in the unemployment insurance program. As the employers claiming the exemption, the burden is on them to prove that they are entitled to it.

The uncontroverted facts show that the employers provide secular social services. The goal of each employer is to help those in need, but that is not exclusively a religious activity. Government agencies and nonprofits with no religious affiliation also provide direct social services to individuals in need. The employers are not operated primarily for religious purposes. The employers are operated for secular social services purposes and, therefore, should remain covered by the Wisconsin Unemployment Insurance law.

The department and the commission request that this Court affirm the court of appeals' decision and confirm the commission's decisions.

Dated: June 7, 2023

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The number of words in the brief, including footnotes, is 10,958.

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CERTIFICATION OF E-FILING AND SERVICE

I certify that I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all parties.

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